77-1785

No. 77-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

KERR-McGEE CHEMICAL CORPORATION, *Petitioner,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

INDEX TO CITATIONS

CASES:

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Petitioner Kerr-McGee Chemical Corporation prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Memorandum Order of the District Court granting Kerr-McGee's motion for summary judgment dated September 29, 1976, is unreported and is reprinted as Appendix A to this Petition at pages 1a-6a, *infra*. The Order of the District Court affirming its earlier Memorandum Order is unreported and is reprinted as Appendix B to this Petition at pages 7a-8a, *infra*. The

Order without opinion by the Court of Appeals for the D.C. Circuit entered on March 28, 1978, is unreported and is reprinted as Appendix C to this Petition at page 9a-10a, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, page 9a-10a, *infra*.) was entered on March 28, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Since passage of the Mineral Leasing Act in 1920, the Secretary of the Interior has consistently applied well-recognized administrative criteria to determine whether leases should be issued. Petitioner's entitlement to phosphate leases was established in 1969 and 1970 pursuant to the application of these administrative criteria. In light of this Court's decision in *Greene* v. *United States*, 376 U.S. 149 (1964), the question presented is:

> May the Secretary of the Interior refuse to issue leases to the petitioner on the ground that revised administrative criteria, first promulgated in 1976 during the pendency of this litigation, should be applied to determine whether petitioner's entitlement to the leases should be reaffirmed?

STATUTE INVOLVED

Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211, provides in pertinent part:

> "(b) Where prospecting or exploratory work is necessary to determine the existence or workability

> of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit, the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit."

Section 9 is reprinted in its entirety as Appendix D to this Petition, page 11a, *infra*. Also reprinted are relevant portions of Section 3 of the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. § 352, page 12a, *infra*.

STATEMENT

1. Factual Background

Petitioner Kerr-McGee Chemical Corporation prospected federal lands located in the Osceola National Forest from 1965 through 1969, pursuant to permits issued by the Department of the Interior, to determine whether valuable deposits of phosphate existed on the lands. These permits were issued by authority granted to the Secretary by Section 9 of the Mineral Leasing Act, as amended in 1960, 30 U.S.C. § 211(b).

The phosphate leasing statute was amended in 1960 to provide an alternative to competitive bidding for phosphate leases. The amended statute authorized the Secretary to create a prospecting permit program to permit exploration of lands not known to contain phosphate identical to other programs that have been author-

ized under the Mineral Leasing Act for coal, sodium and other minerals which had been in effect since 1920. *See* 30 U.S.C. §§ 201(b), 223 (now repealed), 261-62, 271-72, 281-82; *see also* 1960 *U.S. Code Cong. & Admin. News,* 1805-1809.[1] Under such programs, a prospecting permittee explores lands with no known mineral deposits, at its own expense, to determine whether valuable minerals exist on the lands. In the specific case of phosphates, the amended Section 9 provides that, if before the expiration of its permit a permittee "shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit," then "the permittee *shall be entitled* to a lease for any or all of the land embraced in the prospecting permit." 30 U.S.C. § 211(b). (Emphasis supplied.)

In 1969 and 1970, having made discoveries of phosphate on lands covered by its permits, Kerr-McGee applied to the Department for phosphate leases. At this time, Kerr-McGee submitted to the United States Geological Survey all data required by departmental regulations to establish that it met the statutory criteria and was entitled to leases. The USGS considered the application and, on March 28, 1969, and December 1, 1970, certified to the Secretary that Kerr-McGee's discoveries were "valuable" within the meaning of Section 9 and hence that five phosphate leases should be issued to the Company.

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[1] Because the lands in question here were "acquired lands" within the meaning of the Mineral Leasing Act for Acquired Lands, the consent of the agency administering the lands was also required before prospecting permits could be issued. 30 U.S.C. § 352. The Department of Agriculture, whose Forest Service administers the Osceola National Forest, formally gave its consent prior to the issuance of prospecting permits to Kerr-McGee.

This action by the USGS was part of its normal responsibilities within the Department. The Geological Survey has long had the responsibility, delegated to it by the Secretary, for making all factual determinations with respect to the value of mineral discoveries made by prospecting permittees. Since passage of the Mineral Leasing Act in 1920, no other department or division within the Department has, at any time, made these determinations. Leases have been issued automatically once the USGS certifies that an applicant satisfies the statutory criteria.

In reviewing Kerr-McGee's lease applications in 1969 and 1970, the USGS applied administrative criteria to determine the value of Kerr-McGee's discoveries that had been used since the Mineral Leasing Act was passed in 1920. But despite this final Departmental action by the USGS, no leases were issued to Kerr-McGee.

2. Procedural Background To Litigation

Eight years have elapsed since the USGS determined that leases should be issued to Kerr-McGee. Since that time, no affirmative action has been taken on Kerr-McGee's lease applications. The lengthy delay is attributable in part to a decision by the Department to prepare an environmental impact statement on phosphate leasing in the Osceola National Forest pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.* The final impact statement was released in June, 1974, after three years of preparation and has not been challenged as inadequate at any time since its publication.

After preparation of the final impact statement, more than eighteen months passed without any action

by the Department on Kerr-McGee's lease applications. On April 13, 1976, faced with the Department's refusal to take prompt action on its lease applications, Kerr-McGee brought this action, seeking to compel the issuance of the leases to which it was statutorily entitled. Following commencement of Kerr-McGee's action, the Department announced the adoption of new regulations governing the issuance of leases to prospecting permittees, substantially changing the administrative criteria which had to that time been used by the Geological Survey to determine whether leases should be issued. *See* 41 Fed. Reg. 18845 (May 7, 1976). The defense offered by the government in explaining its failure to take action with respect to Kerr-McGee's applications was that it desired to complete new studies on the Osceola National Forest and then apply the new regulations to determine whether Kerr-McGee had made valuable discoveries and accordingly was entitled to leases.

3. Decisions Below

On May 14, 1976, Kerr-McGee moved for summary judgment on the ground that the USGS had certified that its discoveries of phosphate were "valuable" in accordance with the statutory requirements of Section 9, and that its rights to phosphate leases had, accordingly, vested. On September 29, 1976, the District Court issued its memorandum order, directing that the Secretary comply with his statutory duty to issue phosphate leases to Kerr-McGee. (Appendix A, page 6a, *infra.*) The court found that Kerr-McGee had acquired vested rights to its five leases on March 28, 1969, and December 11, 1970, when the United States Geological Survey

> "as designee of the Secretary of the Interior, certified . . . that plaintiff had made valid discoveries of valuable mineral deposits . . . within the meaning of the statute." (Mem. Order, p. 2)

The trial court found that the USGS had applied "standards and criteria prevailing and recognized at that time," and that

> "[t]he government does not now contend that the law had been incorrectly interpreted; that standards and criteria were erroneously applied; or that the plaintiff failed to comply with them in any manner." (Mem. Order, pp. 4-5.) (page 5a.)

The court held that in light of the Department of the Interior's "long established" interpretation of Section 9 "the holder of a prospecting permit who makes a valuable discovery of phosphate has an unqualified statutory entitlement to a preference right lease." Thus Kerr-McGee had an "acquired and vested interest" in the five leases. The court ordered that the Secretary was "mandated to issue said leases immediately." (Mem. Order, p. 6) (page 6a.) The court concluded:

> "The Secretary of the Interior has had nearly seven years to consider Kerr-McGee's lease application. To accede to the government's representation that a final decision may not be forthcoming for an additional 12 to 15 months, is unreasonable and unwarranted. The inordinate delay, accompanied by what appears to be a cavalier disregard of the plaintiff's rights, cannot be condoned." (Mem. Order, p. 4.) (page 4a.)

Thereafter, the government moved the District Court to reconsider its decision, claiming that a comprehensive review of past Departmental practices would not

support the court's critical finding that the USGS had applied longstanding administrative criteria in certifying that Kerr-McGee's discoveries were "valuable." The court stayed its judgment and twice gave the government the opportunity to present additional historical evidence and present argument concerning the results of a search of the Department's files pertaining to mineral leases issued under the Mineral Leasing Act during the past 10 years, not only for phosphate but also for coal, sodium, potassium and sulphur. In its final factual submission to the trial court, the Department stated:

> "This evidence may reasonably be construed as supporting the conclusion that the 1969 and 1970 certifications of discoveries by plaintiffs of valuable deposits of phosphate were made in accordance with the then-prevailing *practice* of the Geological Survey." (emphasis in original.) (J.A. 374.)[2]

On March 4, 1977, the District Court issued an order reinstating its earlier judgment, granting Kerr-McGee's motion for summary judgment. (Appendix B, page 8a, *infra*.) The court stated:

> "The Court has considered the supplemental memoranda of the parties, the supporting affidavits and exhibits and concludes that in the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices." (Order of March 4, 1977, p. 2.) (page 8a.)

[2] "J.A." refers to the Joint Appendix filed with the Court of Appeals.

The court ordered that "the defendant . . . take the necessary steps to comply with" the court's earlier September 29, 1976 order. (*Id.* at 2.) (page 8a.)

On appeal, following submission of briefs by the original parties and a number of *amici curiae,* the Court of Appeals summarily reversed the decision of the District Court and ordered the case dismissed, stating:

> "The ongoing administrative proceedings before the Secretary of the Interior were aborted by the issuance of the writ of mandamus by the District Court. Appellee should have exhausted its administrative remedies before seeking the writ or petitioning for judicial review." (Appendix C, page 10a.)

REASONS FOR GRANTING THE WRIT

The District Court ordered that the Secretary of the Interior comply with his unambiguous statutory duty to issue phosphate leases to Kerr-McGee to which the Company was entitled under Section 9 of the Mineral Leasing Act. That section of the Act creates an automatic entitlement to leases if a prospecting permittee finds valuable deposits of phosphate on the lands covered by a validly issued prospecting permit. Here, the United States Geological Survey, acting in its formal capacity as designee of the Secretary, certified that Kerr-McGee met these statutory criteria and that leases should be issued. The USGS' certifications occurred in 1969 and 1970. Yet no action has been taken to honor Kerr-McGee's vested rights.

The Court of Appeals effectively held that the Department is empowered to apply, retroactively, regulations promulgated in May 1976, redefining the admin-

istrative criteria that should be applied to determine whether a lease applicant is entitled to a lease. The court's decision requiring Kerr-McGee to submit to supplemental administrative procedures long after its rights had vested pursuant to the authoritative administrative determinations that leases should be issued is in square and irreconciliable conflict with this Court's decision in *Greene* v. *United States,* 376 U.S. 149 (1964), as well as in conflict with decisions of the other courts of appeals that have followed *Greene. Koger* v. *Ball,* 497 F.2d 702 (4th Cir. 1974); *Coe* v. *Secretary of HEW,* 502 F.2d 1337 (4th Cir. 1974); *South East Chicago Comm'n* v. *Department of HUD,* 488 F.2d 1119 (7th Cir. 1973). The Court of Appeals either misunderstood, or ignored, the clear mandate of the Mineral Leasing Act and the requirements of the decisions of this Court.

The issue whether Kerr-McGee's vested right to phosphate leases may be destroyed by the Interior Department's retroactive application of revised administrative criteria is of critical importance to private mining companies engaged in costly mineral exploration in the expectation that their statutory entitlement to mineral leases will be honored by the Department if valuable minerals are discovered. Other provisions of the Mineral Leasing Act provide similarly as to other minerals and all are affected by the court of appeals decision. The Department's "cavalier disregard" of Kerr-McGee's rights presents a serious and unprecedented abrogation of the congressional scheme for mineral leasing.

In Section I, we show that because the Mineral Leasing Act requires the issuance of mineral leases to a prospecting permittee who makes a "valuable" dis-

covery of a mineral, Kerr-McGee's rights to leases vested under the Act when, in 1969 and 1970, the USGS applied established administrative criteria and determined that Kerr-McGee's discoveries of phosphates were "valuable" within the meaning of the Mineral Leasing Act. In Section II, we show that Kerr-McGee's rights to leases established under the administrative criteria used to determine the value of mineral discoveries since 1920 may not be destroyed by retroactive application of revised administrative regulations promulgated in 1976 redefining the criteria to be applied by the USGS in making discovery determinations.

I

Under relevant provisions of the Mineral Leasing Act, the Secretary of the Interior has no discretion to refuse to issue mineral leases to a prospecting permittee that has made "valuable" discoveries of a mineral covered by any such provision. With specific respect to phosphate, Section 9 of the Mineral Leasing Act provides that such a prospecting permittee "shall be entitled" to a lease in these circumstances. Other provisions are comparable. *See* 30 U.S.C. §§ 201 (b), 261-62, 271-72, 281-82. There is no room in this statutory scheme for any exercise of discretion by the Secretary after the value of a discovery has been certified. *See Wilbur* v. *United States ex rel. Barton,* 46 F.2d 217, 221 (D.C. Cir. 1930), *aff'd on other grounds sub nom. United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414 (1931).

Since the Mineral Leasing Act was first passed in 1920, the Department has consistently construed provisions of the Act identical to Section 9 as im-

posing a mandatory duty to issue coal,[3] sodium[4] and oil and gas leases.[5] This Departmental construction of the Mineral Leasing Act was formally reviewed in 1975, and in two separate legal memoranda the Department's Solicitors concluded:

> "[T]he holder of a prospecting permit has an *absolute right* to a lease if that holder shows to the Secretary that he has made the requisite discovery." (J.A. 107.) (emphasis supplied.) (*See also* J.A. 82.)

In enforcing the Mineral Leasing Act, the Secretary has delegated sole responsibility to the Geological Survey to make the final factual determination whether the discoveries made by a lease applicant are sufficiently "valuable" so as to require the issuance of a lease. In accordance with this procedure, on March 28, 1969, and December 11, 1970, the Geological Survey certified that Kerr-McGee had made "valuable" discoveries of phosphate and that it was therefore entitled to five phosphate leases. No other agency action remained to be taken after the 1969 and 1970 certifications by the USGS for leases thereupon automatically to be issued.

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[3] *See Peter I. Wold*, [II], 13 I.B.L.A. 63, 66, 80 I.D. 623, 625 (1973); *Emil Usibelli*, 60 I.D. 515, 523 (1951); *Emil Usibelli*, unpublished decision A-26277, decided October 2, 1951; *Directive to the General Land Office by the Secretary of the Interior*, 54 I.D. 350, 351 (1934).

[4] *See Roy Forehand*, 59 I.D. 397, 399 (1974); *Regulations of the Department of the Interior*, Circular No. 1194, 52 I.D. 651, 652 (1929).

[5] *See Interpretation of the Mineral Leasing Act of February 25, 1920, as amended, Opinion of the Department*, June 4, 1937, 56 I.D. 174, 190 (1937); *Montana Eastern Pipeline Co.*, 55 I.D. 189, 191 (1935).

The administrative criteria used in 1969 and 1970 by the USGS to determine the value of Kerr-McGee's discoveries are set forth in the Department's *Geological Survey Conservation Division Manual,* which provides that the criteria are to be used by the USGS in making "[d]iscovery [d]eterminations." *See* Manual § 671.6.1. (J.A. 250.)[6]

The use of these criteria has been repeatedly upheld by the Department. In 1929, the Department issued regulations providing that the criteria should be used in issuing sodium leases under the Mineral Leasing Act,[7] and the same regulations were applied to the issuance of coal, sulphur and potash leases.[8] The Interior Board of Land Appeals upheld the validity of the criteria in *James C. Goodwin,* 9 I.B.L.A. 139, 155, 80 I.D. 7 (1973) and *Emil Usibelli* A-26277 (unpublished

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[6] The criteria are quite extensive. As defined in Section 671.5.2 (B)(1) of the *Conservation Division Manual,* they include:

> "(a) [The mineral's] character and . . . quality,' whence comes its value, and
>
> (b) [The mineral's] accessibility, quantity, thickness, depth and other conditions that affect the cost of its extraction."

While these criteria are redefined in the section quoted above with specific reference to the coal leasing provisions of the Act, the *Manual* makes it plain that the same criteria are to be applied to all minerals subject to the prospecting permit/leasing provisions of the Act, including phosphate, in determining whether leases should be issued. *See* Sections 671.5.2(B)(5) and 671.6.1. The Department has consistently applied identical criteria to all of the minerals subject to leasing under the Mineral Leasing Act.

[7] *See* Regulations of the Department of the Interior, Circular No. 1194, 52 I.D. 651, 652 (1929).

[8] *See* legal memoranda of Solicitors of the Department of the Interior, dated June 30 and December 4, 1975. (J.A. 79, 107.)

decision, dated October 2, 1951). On several occasions, the Department has submitted statements to Congress affirming use of the criteria.[9]

The District Court directed a comprehensive review of Department files, to determine the criteria that had in fact been used by the USGS during the past ten years in issuing coal, sodium, sulphur, potash and phosphate leases under the Mineral Leasing Act.

The District Court found:

> "[I]n the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices." (Order of March 4, 1977, p. 2.) (page 8a.)

In sum, in 1969 and 1970 the Department followed established procedures and applied regulations in effect for more than fifty years to determine that Kerr-McGee had a statutory entitlement to five phosphate leases. Under the Department's longstanding construction of the Mineral Leasing Act, Kerr-McGee acquired vested rights to these phosphate leases.

The Interior Department, however, persists in refusing to issue Kerr-McGee's leases on the ground that

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[9] *See* letter of Interior Solicitor Mellich to Hon. Henry Jackson, Chairman, Senate Committee on Interior and Insular Affairs, dated July 6, 1971 (quoted at J.A. 97); Issue Paper of the Department of the Interior, in connection with the Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (1976) (submitted as Exhibit 1 to Appellee's Supplemental Memorandum to the Court of Appeals, October 13, 1977).

it now wishes to apply criteria different from those traditionally applied by the USGS in determining whether Kerr-McGee's discoveries are "valuable". These new criteria were promulgated on May 7, 1976, three weeks *after* commencement of this action and some six years after Kerr-McGee's rights had vested. *See* 41 *Fed. Reg.* 18845 (May 7, 1976).

The Court of Appeals apparently accepted this argument. Without any explanation, the court reversed the District Court's decision on the ground that Kerr-McGee should have "exhausted its administrative remedies" (*i.e.*, comply with the 1976 regulations) before seeking judicial review. The Court of Appeals thus upheld the power of the government to apply a new standard that would destroy the right of Kerr-McGee to phosphate leases that vested when it was found to have made valuable discoveries.

II

The decision by the Court of Appeals is in direct conflict with this Court's decision in *Greene* v. *United States,* 376 U.S. 149 (1964), which holds that an agency has no power to apply its regulations retroactively if such application impairs or destroys vested rights. In *Greene,* the Court considered whether a government employee, unlawfully discharged in 1953 due to revocation of his security clearance, could assert an administrative claim for restitution. The case turned on whether the plaintiff's claim for damages was controlled by a 1955 Department of Defense regulation (which permitted such contractual restitution claims) or a 1960 regulation issued while the plaintiff's claim was being processed by the Department (which would have prevented assertion of the claim.)

The Court held that Greene's rights "matured and were asserted under the 1955 directive," and that Greene had obtained "the requisite final, favorable determination" under the 1955 regulations. 376 U.S. at 160. The Court in *Greene* relied in part on the general principle that "a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " (*Id.*) But the Court did not look to the intent of the agency in promulgating the 1960 regulation. Rather, it assessed the unfair impact such retroactive application of administrative regulations might have on individual rights and held that the retroactive application of administrative regulations to destroy rights established under prior regulations was unlawful. The Court stated:

> "In view of the substantial differences between the two regulations and in view of the additional factual determinations that would be relevant under the 1960 regulation but irrelevant under the 1955 regulation, we conclude the 1960 regulation does not provide a reasonable basis for reviewing petitioner's rights under the 1955 regulation . . . . Since in this case the only available administrative procedure entailed the burden of presenting the claim under an inapplicable and substantially revised regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued." 376 U.S. at 163.

The Court reaffirmed its holding in *Greene* in *Bradley* v. *Richmond School Board,* 416 U.S. 696, 720 (1974). *Greene* has been followed in such cases as *Koger* v. *Ball,* 479 F.2d 702, 706 (4th Cir. 1974); *Coe* v. *Secretary of HEW,* 502 F.2d 1337, 1340 (4th Cir. 1974); *South East Chicago Comm'n* v. *Department of HUD,* 488 F.2d 1119, 1127 (7th Cir. 1973), and *Saint Francis Memorial Hospital* v. *Weinberger,* 413 F. Supp. 323, 332 (N.D. Cal. 1976). As the Court of Appeals held in the *Coe* case, "retrospective application" of administrative regulations is prohibited where it interferes with an "antecedent right" under earlier regulations. *See* 502 F.2d at 1340.

As in *Greene,* Kerr-McGee's rights "matured and were asserted" under the regulations of the Department in effect in 1969 and 1970 when it first applied for phosphate leases. And as in *Greene,* Kerr-McGee obtained "the requisite final, favorable determination" by the agency when the USGS certified the value of its discoveries under the old regulations.

The Department now seeks to apply regulations that very substantially alter the criteria to be used by the USGS in determining the value of mineral discoveries. The Court of Appeals upheld the Department's right to require Kerr-McGee to submit to these new additional procedures. The decision that Kerr-McGee failed to submit to those additional procedures and thus to exhaust its administrative remedies plainly collides with *Greene* and the court of appeals decisions that followed it. No less than in *Greene,* the additional administrative procedures required by the Court of Appeals are "inappropriate and inadequate and therefore need not be pursued." Kerr-McGee's statutory rights as established under the prior Departmental regulations must be honored.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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June 16, 1978

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0608

KERR-MCGEE CHEMICAL CORPORATION, *Plaintiff*,

v.

THOMAS S. KLEPPE, et al., *Defendants*.

Memorandum Order

Kerr-McGee Chemical Corporation (Kerr-McGee) seeks an order compelling the defendants, Secretary of the Interior and the Department of the Interior, to issue it a preference right lease, 30 U.S.C. § 211(b),[1] for the purpose of mining phosphate in the Osceola National Forest (Osceola) in Florida. Jurisdiction is based on 5 U.S.C. §§ 701-06; 28 U.S.C. § 1331(a); 28 U.S.C. § 1361; and 28 U.S.C. §§ 2201-02. The matter in controversy, exclusive of interest and costs, exceeds $10,000.

The matter is before the Court on plaintiff's motion for summary judgment and the Department of Interior's motion to dismiss this cause as to them. The Court has reviewed all memoranda, affidavits and exhibits filed and after oral hearing concludes that both motions should be granted.[2]

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[1] 30 U.S.C. § 211(b) provides in pertinent part that
> if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease. . . .

[2] The State of Florida was granted leave to intervene in this proceeding and filed opposition to plaintiff's motion for summary judgment.

Factual Background

The critical facts are free of dispute.[3] In 1964, Kerr-McGee applied for five prospecting permits to explore for mineral deposits in Osceola. Those permits were issued by the Secretary of the Interior pursuant to the authority of § 211(b). Later, in January 1969 and August 1970, Kerr-McGee filed applications for preference right leases based on commercial discoveries of phosphate on portions of the same land on which it had been granted a permit. The United States Geological Survey, as designee of the Secretary of the Interior, certified on March 28, 1969, and December 11, 1970, that plaintiff had made valid discoveries of valuable mineral deposits on these lands within the meaning of the statute.[4]

On July 27, 1971, the State of Florida filed a complaint in this Court (*State of Florida* v. *Morton, et al.*, C.A. No. 1496-71)[5] against the Secretary of the Interior and other federal government officials seeking to enjoin those defendants from approving phosphate mining leases in Osceola and from further processing requests for such leases. The plaintiff Kerr-McGee is an intervening defendant in that proceeding. On October 17, 1972, a motion for preliminary injunction was denied the State of Florida in that litigation upon a finding, *inter alia*, that the federal defendants had "committed themselves to taking no final administrative action on pending or future permits or leases prior to completion of the final Osceolo NEPA statement."

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[3] The factual allegations detailed here are found in the memoranda, exhibits or affidavits submitted by the parties.

[4] *See* Affidavit of Russell G. Wayland, Chief, Conservation Division, United States Geological Survey, June 7, 1976.

[5] The State of Florida sought equitable relief on the grounds that the Secretary of the Interior failed to comply with the provisions of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1973).

Lengthy delays were associated with the final preparation of the environmental impact statement. In August of 1972 the statement was promised by mid-June of 1973. However, the final statement covering phosphate leasing in the Osceola National Forest was not prepared and issued by the Department of the Interior until June 27, 1974.

After the statement was issued, the Justice Department, on behalf of the Secretary of the Interior, repeatedly represented to this Court that a decision respecting the issuance of preference right leases for lands in Osceola would be made shortly. The Court was also advised that a draft program option document respecting the Osceola leases was distributed to offices both inside and outside the Department of the Interior between October 15 and November 1, 1974, and that a final decision option document would be submitted to the Secretary of the Interior in early December 1974.

Between May 15 and mid-October 1975, the Department of the Interior survived three Secretaries of the Interior. Rogers C. B. Morton, who had served since early 1971, resigned when he was sworn in as Secretary of Commerce on May 1, 1975. He was followed by Stanley Hathaway, who served from June 13 to July 25, 1975. The present Secretary, Thomas S. Kleppe, was sworn in as Secretary on October 17, 1975. This turn over in the cabinet position created uncertainty, confusion and further delay in the decision with respect to the leases sought by the plaintiff.

By letter dated September 22, 1975, the Associate Solicitor for the Department of the Interior, informed Kerr-McGee that it was necessary for Thomas S. Kleppe, then Secretary-Designate, to be fully apprised of the Osceola phosphate leasing matter, and, depending upon the length of the confirmation process, it was possible that a decision would be made in the near future. On October 17, 1975, the Justice Department, on behalf of the Secretary, announced

to the Court (in *State of Florida* v. *Morton*), that it was no longer possible to predict when a decision respecting the plaintiff's applications would be made.

Later, on October 28, 1975, the Secretary issued a "news release" stating: that additional information was necessary before a Department decision could properly be made on preference right lease applications within Osceola; and, that the Secretary was therefore directing an "intensive two-year study" to analyze the effects of phosphate mining upon northern Florida's underground water supply and wildlife. The release further stated that action on lease applications would be stayed until the two-year study was completed and that the Department had taken preliminary steps to secure the necessary information and tentatively expected to complete the studies by December 1977.

On May 7, 1976, the Department of the Interior also promulgated a new set of regulations [6] prescribing the information to be submitted by a permittee to demonstrate the existence of coal in commercial quantities or the existence of a valuable deposit of one of the other minerals (including phosphate) for which prospecting permits are issued. 30 U.S.C. §§ 201(b), 211(b), 262, 272 and 282.

CONCLUSIONS

The Secretary of the Interior has had nearly seven years to consider Kerr-McGee's lease application. To accede to the government's representation that a final decision may not be forthcoming for an additional 12 to 15 months, is unreasonable and unwarranted. The inordinate delay, accompanied by what appears to be a cavalier disregard of the plaintiff's rights, cannot be condoned.

The Department of the Interior has long established policy with respect to interpretation of § 211(b), and it has consistently recognized that the holder of a prospecting

[6] 41 Fed. Reg. 18845.

permit who makes a valuable discovery of phosphates has an unqualified statutory entitlement to a preference right lease.[7] Indeed, this obligation of the Secretary of the Interior has been conceded by the government.[8] Under the circumstances, the plaintiff is entitled to rely upon the Department's interpretations and policies.

The prior March 28, 1969, and December 11, 1970, certifications of the Geological Survey that plaintiff had discovered valuable deposits were based on standards and criteria prevailing and recognized at that time. The government does not now contend that the law had been incorrectly interpreted; that standards and criteria were erroneously applied; or that the plaintiff failed to comply with them in any manner. *Automobile Club of Michigan* v. *Commissioner of Internal Revenue,* 353 U.S. 180, 183 (1957); *Pennsylvania Water and Power Co.* v. *Federal Power Comm'n,* 123 F.2d 155, 162 (1941), *cert. denied,* 315 U.S. 806 (1942).

Plaintiff has an acquired and vested interest. Fairness and equity dictate that the recently implemented regulations of May 1976 cannot void that interest. *Coe* v. *Secretary of Health, Education and Welfare,* 502 F.2d 1337, 1340 (4th Cir. 1974); *Koger* v. *Ball,* 497 F.2d 702, 706 (4th Cir. 1974). To do so, would result in a gross injustice.

Kerr-McGee's statutory entitlement cannot be abridged by the National Environmental Policy Act. The requirements of that Act cannot supplant the statutory requirement of § 211(b). *United States* v. *SCRAP,* 412 U.S. 669, 694 (1973). The issuance of a lease will permit plaintiff to commence preparation of a mining plan but their proposals

[7] Office of the Solicitor, Department of the Interior, Legal Memoranda of Solicitor, "Preference Right Leasing," June 30, 1975, and December 4, 1975. Pl. Ex. 3 and 4.

[8] Answer of Federal Defendants, C.A. No. 1496-71.

must be approved by the Secretary of the Interior before mining operations actually begin.

Mandamus is warranted to direct the Secretary of the Interior to perform a ministerial act.

The Department of the Interior is improperly named as a party defendant. *Blackmar* v. *Guerre,* 342 U.S. 512 (1952).

Accordingly, it is this *29th* day of September, 1976,

ORDERED that plaintiff's motion for summary judgment be and it hereby is granted;

DECLARED that the phosphate leasing statute, 30 U.S.C. § 211(b), requires the issuance of a preference right mining lease when a permittee makes a discovery of a valuable mineral deposit on land embraced in a valid permit;

DECLARED that since Kerr-McGee has made valuable discoveries under valid permits BLM-A-079903, BLM-A-079904, BLM-A-079905, BLM-A-079906 and BLM-A-079907, preference right leases must issue;

ORDERED that the Secretary is enjoined from refusing to issue said leases to which plaintiff is entitled, and is mandated to issue said leases immediately;

ORDERED that this action is dismissed as to the defendant Department of the Interior.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Filed September 29, 1976.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0608

KERR-MCGEE CHEMICAL CORPORATION, *Plaintiff,*

v.

CECIL D. ANDRUS, *Defendant.*

Order

On September 29, 1976, this Court entered a Memorandum Order granting Kerr-McGee's motion for summary judgment, declaring plaintiff's entitlement to certain preference right phosphate leases and enjoining the Secretary of the Interior * from refusing to issue the leases.

In holding for the plaintiff, the Court found that the Department of the Interior had an established policy which recognized that holders of phosphate prospecting permits who made valuable discoveries of phosphates had a statutory entitlement to preference right leases, and that the 1969 and 1970 certifications of the United States Geological Survey (USGS) that Kerr-McGee had discovered valuable deposits were based on prevailing and long utilized standards and criteria.

Following the September 29th ruling, the Government moved to alter or amend that Memorandum Order claiming that there was doubtful support for the findings that the USGS adhered to established administrative practices in certifying plaintiff's phosphate discoveries. Accordingly, on November 15, 1976, the Court stayed the earlier ruling and

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* At the time the complaint was filed, Thomas S. Kleppe was the Secretary of the Interior. The Court, sua sponte, has substituted the present incumbent in that position as party defendant.

directed the parties to submit additional supporting data addressed to what practices had been followed with respect to the grant of preference right leases for phosphate, coal, sodium and other minerals. Specifically, the Court was concerned with and directed the parties to submit memoranda on the issue as to whether the defendant had in the past granted preference right leases based on the standard, the commercial quantity and quality test. That standard had been used by the USGS as a basis for finding that plaintiff had made appropriate discoveries entitling it to issuance of phosphate preference right leases.

The Court has considered the supplemental memoranda of the parties, the supporting affidavits and exhibits and concludes that in the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices.

Accordingly, it is this 3rd day of March, 1977

ORDERED that the Order of November 15, 1976, is vacated and set aside, and it is further

ORDERED that the Memorandum Order of September 29, 1976, is affirmed, and the defendant is directed to take the necessary steps to comply with that Order.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Filed March 4, 1977.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1977

Civil Action No. 76-0608

No. 77-1478

KERR-MCGEE CHEMICAL CORP.

v.

CECIL D. ANDRUS, Secretary of the Interior, *et al.*
STATE OF FLORIDA, Appellant

No. 77-1483

KERR-MCGEE CHEMICAL CORP.

v.

CECIL D. ANDRUS, Secretary of the Interior, Appellant
DEPARTMENT OF THE INTERIOR *et al.*

Appeals from the United States District Court for the District of Columbia.

Before: SWYGERT,* WRIGHT, and ROBB, Circuit Judges.

Judgment

(FILED MARCH 28, 1978)

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. While the issues

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* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The ongoing administrative proceedings before the Secretary of the Interior were aborted by the issuance of the writ of mandamus by the District Court. Appellee should have exhausted its administrative remedies before seeking the writ or petitioning for judicial review.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the District Court of September 29, 1976 and March 4, 1977 are hereby reversed. It is

FURTHER ORDERED and ADJUDGED by this court that this matter is remanded to the District Court with instructions to dismiss the proceedings there pending.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX D

A. Pertinent provisions of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211, read as follows:

3. PHOSPHATES

§ 211. PHOSPHATE DEPOSITS—AUTHORIZATION TO LEASE LAND; TERMS AND CONDITIONS; ACREAGE

(a) The Secretary of the Interior is authorized to lease to any applicant qualified under this chapter, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, any phosphate deposits of the United States, and lands containing such deposits, including associated and related minerals, when in his judgment the public interest will be best served thereby. The lands shall be leased under such terms and conditions as are herein specified, in units reasonably compact in form of not to exceed two thousand five hundred and sixty acres.

PROSPECTING PERMITS; ISSUANCE; TERM; ACREAGE; ENTITLEMENT TO LEASE

(b) Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

EXTENSION OF TERM OF PERMIT

(c) Any phosphate permit issued under this section may be extended by the Secretary for such an additional period, not in excess of four years, as he deems advisable, if he finds that the permittee has been unable, with reasonable diligence, to determine the existence or workability of phosphate deposits in the area covered by the permit and desires to prosecute further prospecting or exploration, or for other reasons warranting such an extension in the opinion of the Secretary.

• • •

B. Pertinent provisions of the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. § 352, read as follows:

§ 352. DEPOSITS SUBJECT TO LEASE; CONSENT OF DEPARTMENT HEADS; LANDS EXCLUDED

Except where lands have been acquired by the United States for the development of the mineral deposits, by foreclosure or otherwise for resale, or reported as surplus pursuant to the provisions of the Surplus Property Act of 1944, all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks or monuments, (b) set apart for military or naval purposes, or (c) tidelands or submerged lands) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof. The provisions of sections 271 to 276 of this title shall apply to deposits of sulfur covered by this chapter wherever situated. No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having ju-

risdiction over the lands containing such deposit, or holding a mortgage or deed of trust secured by such lands which is unsatisfied of record, and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered; *Provided,* That nothing in this chapter is intended, or shall be construed, to apply to or in any manner affect any mineral rights, exploration permits, leases or conveyances nor minerals that are or may be in any tidelands; or submerged lands; or in lands underlying the three mile zone or belt involved in the case of the United States of America against the State of California now pending on application for rehearing in the Supreme Court of the United States; or in lands underlying such three mile zone or belt, or the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America.